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the final decision by the Supreme Court, which may come at any time now. The case of *Lynch* v. *Turrish*,[9] also in the circuit court of appeals, is cited by the court in the instant case and disregarded as distinguishable. It is submitted that it is clearly *contra*, and that the decision of the highest court on it will be decisive of the instant case. The facts were, that all the capital of a corporation was invested in land which had increased in value prior to March 1, 1913, but such value had remained stationary, subsequently, until sold. The money was distributed as dividends, and the court held that the recipient did not have to pay an income tax on any part of the sum received. The case is sound, for the distribution was one of capital as of March 1, 1913. But were the rights of the shareholder in reference to this increase in value any fuller than in reference to the earnings collected by the corporation in the instant case? If the undivided share of the corporate assets or the market value of the share, as of March 1, 1913, was the capital of the shareholder on that date in the former case, why is not the same true in the latter? From the point of view of the corporation, the increase in the value of the land was increase in capital assets with, as yet, no separation, while the accumulated earnings were clearly separated income. From the point of view of the shareholder, however, the increase in corporate assets resulted in an increase in his capital assets in one case, if it did in the other.[10]

STATE REGULATION OF COMMUTATION RATES.—With the growth of railroad industry, there has been an increasing tendency on the part of state legislatures to regulate intrastate rates, and the course of this regulation has been and will continue to be profoundly affected by the attitude of the courts towards such legislation. In this respect, the recent case of *Pennsylvania R. R.* v. *Towers* (1917) 38 Sup. Ct. 2, and *Lake Shore & Michigan Southern Ry.* v. *Smith*,[1] decided eighteen years earlier, are of particular interest as furnishing the basis for an inference as to the possible development of the law during the period embraced within the dates of the two decisions. In the earlier case, the Supreme Court decided, by a divided bench, that a Michigan statute requiring railroads to furnish mileage books, good for two years and usable by the purchaser or his family, at a

[9](C. C. A. 1916) 236 Fed. 653. Lynch *v.* Hornby (C. C. A. 1916) 236 Fed. 661, was decided at the same time and in the same way. In that case only part of the property holdings in the corporation—timber lands—was sold, and the money returned as dividends. Southern Pac. Co. *v.* Lowe (D. C. 1917) 238 Fed. 847 is directly in line with the instant case. The decision which was overruled by the instant case, Gulf Oil Corporation *v.* Lewellyn (D. C. 1916) 242 Fed. 709, is well reasoned and brings out clearly the issue now to be decided by the Supreme Court.

[10]A later statute clearly recognizes the defect of the 1913 law; 39 Stat. c. 463, Title I, pt. 1, § 2(a) "the term 'dividends' * * * shall be held to mean any distribution * * * by a corporation * * * out of its earnings or profits accrued since March first, nineteen hundred thirteen". § 2 (c). "For the purpose of ascertaining the gain derived from the sale * * * of property, real, personalty, or mixed, acquired before March first, nineteen hundred and thirteen, the fair market price or value of such property as of March first, nineteen hundred and thirteen, shall be the basis of determining the amount of such gain derived."

[1](1899) 173 U. S. 684, 19 Sup. Ct. 565.

rate somewhat below that set for ordinary passenger service, was unconstitutional. The Towers case held, three judges dissenting, that, when a railroad had recognized the necessity and propriety of rendering a particular service to suburban communities by establishing commutation rates, the state might reasonably regulate such rates, and fix them below the maximum charge for general service.

While respecting the decision of the Supreme Court in the Smith case,[2] the tendency has been to restrict it to its particular facts. Thus state statutes requiring free transportation for policemen while traveling in pursuance of their duties,[3] and reduced fares for militiamen,[4] and school children[5] have been upheld by some state courts, though it is true that there is a split of authority and the questions have never been squarely before the Supreme Court.[6] In 1900, the Interstate Commerce Commission intimated that the regulation of commutation rates was beyond governmental control,[7] but, in 1912, when the question was before it, the Commission, although doubting its power to compel a railroad to introduce commutation rates, upheld its authority to regulate such rates where a railroad had already introduced them.[8] The trend of these decisions seems in favor of the holding in the Towers case. And the quesion is raised whether that decision can be considered consistent with the earlier opinion in the Smith case, or whether it is indicative of a gradual change in the judicial attitude towards rate regulation.

The exception in the case of mileage books must be justified, if at all, on the basis that such a method of doing business introduces new factors such as the enabling of a railroad to simplify its book-keeping

[2]Commonwealth *v.* Atlantic Coast Line Ry. (1906) 106 Va. 61, 55 S. E. 572; Beardsley *v.* New York, *etc.* R. R. (1900) 162 N. Y. 230, 56 N. E. 488, holding the mileage book law invalid as regards railroads incorporated before its enactment. The law is, however, valid as regards railroads incorporated after its enactment. Purdy *v.* Erie R. R. (1900) 162 N. Y. 42, 56 N. E. 508.

[3]State *v.* Sutton (1912) 83 N. J. L. 46, 84 Atl. 1057, aff'd. 244 U. S. 258; *contra,* Wilson *v.* United Traction Co. (1902) 72 App. Div. 233, 76 N. Y. Supp. 203.

[4]State *v.* Chicago, *etc.* Ry. (1912) 118 Minn. 380, 137 N. W. 2; *contra, In re* Gardner (1911) 84 Kan. 264, 113 Pac. 1054.

[5]"As a police regulation in the interest of education, the law may well require street railway companies to permit these children to ride to school upon their cars, without profit to the companies, provided it can be done without causing them loss." Commonwealth *v.* Interstate Consol. Street Ry. (1905) 187 Mass. 436, 439, 73 N. E. 530, aff'd. 207 U. S. 79.

[6]The Massachusetts law requiring street railways to carry school children at half fare, Commonwealth *v.* Interstate Consol. Street Ry., *supra,* was upheld in Interstate Consol. Street Ry. *v.* Commonwealth (1907) 207 U. S. 79, 28 Sup. Ct. 26, on the ground that it was passed before the company's charter was granted, and became part of that charter. Mr. Justice Holmes intimated that the result would have been the same regardless of these special facts. State *v.* Sutton, *supra,* was affirmed in Sutton *v.* New Jersey (1917) 244 U. S. 258, 37 Sup. Ct. 508. The Court, however, laid emphasis upon the fact that the company had taken its charter subject to alteration by the state.

[7]Sprigg *v.* Baltimore & Ohio R. R. (1900) 8 I. C. C. 443.

[8]Commutation Rate Case (1911) 21 I. C. C. 428. The same view has since been taken by the New York courts. People *ex rel.* New York, *etc.* R. R. *v.* Public Service Comm. (1915) 215 N. Y. 689, 109 N. E. 1089, affirming 159 App. Div. 531, 145 N. Y. Supp. 503.

system and to secure extra cash assets in advance. Mileage books are practically nothing more nor less than single tickets sold at wholesale, with the added feature that they may be used for a trip of any length whatsoever. This is clearly a discrimination in favor of those who can afford to purchase in large lots,[9] a type of discrimination which has always been frowned upon.[10] And although it has been permitted in some instances, yet railroad commissions have consistently refused to compel it.[11] Commutation tickets, however, although they have much in common with mileage books, in that they enable the carrier to obtain a larger amount of patronage together with a reduced cost of book-keeping, accounting and other expenses incidental to the issuance of separate tickets,[12] deal, nevertheless, with a wholly different type of service.[13] By means of them, an individual secures the right to travel between two points for a certain period of time, and the charge is the same whether or not the privilege is entirely used. True, they are issued in favor of a particular class of travellers, but generally it is a class which the railroads themselves have created. Relying upon them, a large group of commuters has arisen; and the arbitrary withdrawal of such tickets would work an unjustifiable hardship. Since the public as well as the railroad is to be considered in determining rates,[14] and since the establishment of this type ticket by the railroads

[9]"The power of the legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof." Lake Shore, *etc.* Ry. *v.* Smith, *supra,* footnote 1, at pp. 692-693.

[10]Burlington, *etc.* Ry. *v.* Northwestern Fuel Co. (C. C. 1887) 31 Fed. 652; Providence Coal Co. *v.* Providence, *etc.* R. R. (1887) 1 I. C. C. 107; see United States *v.* Tozer (D. C. 1889) 39 Fed. 369.

[11]Field *v.* Southern Ry. (1908) 13 I. C. C. 298.

[12]And in this respect they are somewhat analogous to carload rates on freight. California Commercial Ass'n. *v.* Wells, Fargo & Co. (1908) 14 I. C. C. 422; see Commutation Rate Case, *supra.*

[13]See Commutation Rate Case, *supra.* In this respect it is to be noted that freight rates differ with commodities according to the service rendered, and "The charges for the carriage of freight of different kind are fixed at different rates according to their classification, and this difference, presumably at least, is gauged to some extent by a difference in cost of transportation, as well as the form, size and value of the packages and the cost of handling them." Minneapolis & St. Louis R. R. *v.* Minnesota (1902) 186 U. S. 257, 267, 22 Sup. Ct. 900; see Seaboard Air Line Ry. *v.* Florida (1906) 203 U. S. 261, 27 Sup. Ct. 109.

[14]Smyth *v.* Ames (1898) 169 U. S. 466, 547, 18 Sup. Ct. 418, where the Court said: "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth." See Texas, *etc.* Ry. *v.* Interstate Com. Comm. (1896) 162 U. S. 197, 233, 16 Sup. Ct. 666. So, although a fair return is allowed the company, yet where a lack of profit is due to poor management, see Dow *v.* Beidelman (1888) 125 U. S. 680, 8 Sup. Ct. 1028; Railway Co. *v.* Smith (1895) 60 Ark. 221, 243, 29 S. W. 752, or to the fact that the road has been laid out through sparsely settled country with the idea of bettering the interstate route, or in expectation of the growth of the community, *In re* Arkansas Railroad Rates (C. C. 1909) 168 Fed. 720, 732; Southern Pacific Co. *v.* Bartine (C. C. 1909) 170 Fed. 725, 767, the public will not be forced to stand the loss.

shows *prima facie* that the return is adequate, the basis for its public control would seem unquestionably sound.

The Towers case seems to draw a further distinction, namely, that the railroad had already started the practice of issuing commutation tickets, whereas in the Smith case there was no proof of prior issuance of mileage. But in the Smith case the Court said: "It is no answer to the objection to this legislation, to say that the company has voluntarily sold thousand-mile tickets good for a year from the time of their sale. What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature."[15] If this statement was intended to prohibit mere regulation, as well as to deny the power to require the new type of service, it would seem to be at least questioned if not entirely overruled. The only valid objection to the statute in the Smith case was that it required the company to furnish a sort of service which it was under no duty to furnish. On this ground the case might be sustained despite the Towers decision, for there would seem to be the basis for a sound distinction between commutation tickets and mileage books. It is probable, however, that the opinion in the instant case indicates a change in political thought and that, with the Supreme Court's more liberal attitude towards regulatory legislation, a statute requiring the issuance of mileage would be upheld to-day.

DEFENSES OF A SURETY BASED UPON THE NON-LIABILITY OF THE PRINCIPAL DEBTOR.—An obligation which will place the one assuming it in the position of a surety, provided the other requisites of the relation of suretyship are present, may result from the making of a promise of any content whatever. But the more common of such promises are of three types.[1] The first is a promise by *A* jointly, or jointly and severally, with *B* to *C*, to do some act. The second is a separate promise by *A* to *C* to do some act if *B* does not.[2] The third is a promise by *A* to *C* to answer for the debt, default or miscarriage of *B*.

A, in these cases, if his promise is obligatory, will be a surety if there is a primary obligation, intended to be secured, owing from *B*, the principal, to *C*. But *A's* obligation to perform his promise depends upon the normal principles of contract law and the fourth section of the Statute of Frauds, and not upon whether he will be a surety if he is bound.[3] This position is fully borne out by the decisions of the

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[15]Lake Shore, *etc.* Ry. *v* Smith, *supra*, footnote 1, at p. 697.

[1]In order to avoid repetition it has been thought advisable to refer to the one who assumes an obligation which may be that of a surety as *A*, to the one to whom this obligation is owing as *C*, and to the one who would be in the position of a principal if *A* was a surety, as *B*.

[2]A promise of the second type differs from one of the first type in that it is a separate promise conditioned upon the failure of *B* to do some act, while the latter is a joint, or joint and several, promise with *B*; and it differs from the third type in that it makes no reference to a promise or obligation from *B* to *C*, while a promise of the third type is one to answer for a promise or obligation from *B* to *C*.

[3]The two questions, the one as to whether *A* is bound upon his promise, the other, as to whether he is a surety, do not appear, always, to have been distinguished. See 13 Columbia Law Rev. 426; 1 Brandt, Suretyship and Guaranty (3rd ed.) 163; Childs, Suretyship and Guaranty, § 129. In fact, it is generally said that the liability of the surety is measured by